STATE of INDIANA

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FILED

MAR 19 2003

INDIANA UTILITY
REGULATORY COMMISSION

**CAUSE NO. 42303**

**IN THE MATTER OF THE COMPLAINT OF INDIANA PAYPHONE ASSOCIATION FOR A COMMISSION DETERMINATION OF JUST AND REASONABLE RATES AND CHARGES AND COMPLIANCE WITH FEDERAL REGULATIONS**

**RESPONDENTS: AMERITECH INDIANA, VERIZON AND SPRINT/UNITED**

You are hereby notified that on this date, the Indiana Utility Regulatory Commission has caused the following entry to be made:

On October 10, 2002, Complainant, Indiana Payphone Association, ("IPA" or "Complainant") filed its Complaint against Indiana Bell Telephone Company ("SBC"), Verizon North Inc. and Contel of the South, Inc., d/b/a Verizon North Systems (together "Verizon") and United Telephone Company of Indiana, Inc. d/b/a Sprint ("Sprint") with the Commission. The Complainant sought a determination of whether Respondents' rates and charges for underlying pay telephone access lines, features and usage are reasonable, just, lawful, and comply with the Federal Communications Commission's (the "FCC") New Services Test as specified in the FCC's March 2, 2000 Order in FCC 02-25 as modified by its January 31, 2002 "Memorandum Opinion and Order."

On December 16, 2002, Respondents Verizon and Sprint (together the "Respondents") filed their "Respondents Verizon and Sprint's Motion for Judgment on the Pleadings" (the "Motion") requesting that the Commission dismiss the Complaint against the Respondents on the basis that Respondents are not Bell Operating Companies ("BOCs") for which federal law requires the imposition of the "New Services Test." The Complainant responded on December 20, 2002 and the Respondents filed their Joint Reply on January 9, 2003.

Motion for Judgment on the Pleadings.

In their Motion, the Respondents requested that the Commission dismiss the Respondents from this Cause on the grounds that the Respondents are not Bell Operating Companies subject to the imposition of the "New Services Test." Respondents further argued that the IPA failed to establish why the Commission should impose that test on Respondents as non-BOC telecommunications providers. Motion at 1.

The Respondents asserted that the FCC has no authority to apply the New Services Test to non-BOC local exchange companies ("LECs") under Section 276(b)(1)(B) of the Telecommunications Act of 1996. Motion at 2. The Respondents claimed that "Neither Verizon-Indiana nor Sprint is a BOC as defined by the Telecommunications Act at 47 U.S.C. § 153." Id. Respondents point to the Complainant's pleadings and asserted that Complainant admitted "that the New Services Test is applicable only to the BOCs." Motion at 3.

Respondents further argued that the "New Services Test should not be imposed on non-BOC LECs." Motion at 4. Respondents identified the following as supporting their arguments:

- Congress did not see fit to reach that conclusion, and in fact limited its statutory mandate to BOCs;
- This Commission has not seen fit to reach that conclusion;
- The order sought by the Petitioner would require Verizon-Indiana and Sprint to undertake an expensive study at the Petitioner's whim;
- Payphone competition is already working in Verizon-Indiana and Sprint's service area.
- Petitioner has made no showing that rates and charges established after such studies are undertaken will be any more supportive of Commission goals than are the current Verizon-Indiana and Sprint's rates and charges.

Id. Respondents argued that Complainant's "position boils down to an assertion that the Commission should order Verizon-Indiana and Sprint to prepare and file new cost studies – not because federal law requires it (federal law does not), and not because payphone competition would be better off in Verizon-Indiana and Sprint's service area (it may or may not be), but merely because [Complainant] hopes to obtain a lower access line rate. In fact, it does not make sense to impose the New Services Test on non-BOC LECs." Id. at 4-5. Respondents also directed the Presiding Officers' attention to a ruling by the Ohio Commission that dismissed all non-BOC telephone companies from the proceeding. Motion at 7.

In their Motion, Respondents asserted that "Verizon-Indiana and Sprint have already established compliance with the New Services Test." Motion at 5. According to Respondents, the Commission in various orders in Cause No. 40830 "indicated" that the Respondents' tariffs "were in compliance with the New Services Test and that while the payphone rates included a substantial mark-up over direct costs, they fall within acceptable parameters determined by the FCC." Id. Respondents argued that, "even if the Commission were to find that non-BOC LECs are subject to the New Services Test, Verizon-Indiana and Sprint have already demonstrated the conclusion that [IPA seeks]: Verizon-Indiana and Sprint's rates are nondiscriminatory and conform to the New Services Test." Motion at 6.

IPA's Response to the Motion.

In its "The Indiana Payphone Association's Response to Respondents Verizon and Sprint's Motion for Judgment on Pleadings" (the "Response"), the IPA argued that Respondents' Motion should be denied because "this Commission can and should continue to apply the New Services Test to all LECs, including Verizon and Sprint." Response at 2.

Complainant argued in its Response that Verizon and Sprint are the dominant monopoly providers in their respective Indiana territories and that the Respondents provide payphone services to the public in competition with independent payphone providers. Response at 1. According to the IPA, "Given their respective market shares in Indiana, competition will be served only by the consistent and comprehensive application of the New Services Test to all LECs, not just Indiana Bell..." Response at 10.

The IPA argued that the Commission's Order in Cause No. 40830 applied the FCC's New Services Test to the rates at issue in that cause. Response at 2. The Complainant stated that "Since October 6, 1999, this Commission has applied the New Services Test to all LECs doing business in Indiana" and urged the Commission to "maintain its consistent practice of evaluating similarly situated carriers' rates using the same methodology." Response at 9-10.

Further, the IPA claimed that the FCC encouraged state commissions to apply the New Services Test to non-BOC LECs:

> Despite holding that it has no jurisdiction to require non-BOC LEC compliance with the [New Services Test], the FCC made it clear that it wished it could hold otherwise and encouraged the states to do what it believed it could not: 'We do, however, encourage states to apply the [New Services Test] to all LECs, thereby extending the pro-competitive regime intended by Congress to apply to the BOCs to other LECs that occupy a similarly dominant position in the provision of payphone lines.'

Response at 6. The Complainant asserted that the Respondents "provided no legal authority to support the proposition that individual states are forbidden from applying the New Services Test." Response at 8.

Complainant argued that even if the FCC lacks jurisdiction, Respondents' argument is fatally flawed because "this Commission possesses authority to apply the New Services Test to all LECs doing business in Indiana, including Verizon and Sprint." Response at 7. According to the IPA, Indiana Code § 8-1-2-4 confers jurisdiction on the Commission to "prohibit unlawful rates of all public utilities – not just BOC LECs," and gives the Commission authority to apply the New Services Test to non-BOC LECS such as the Respondents here. Id. The Complainant stated "Verizon and Sprint have offered no legitimate reason for the Commission to waive its authority." Response at 9.

Respondents' Reply.

In their, "Joint Reply to the IPA's Response to Joint Motion for Judgment on the Pleadings" (the "Joint Reply"), the Respondents argued that the IPA did not dispute that the Respondents are not BOCs and that the Complainant sought to expand its allegations through its Response:

> A review of the Petition shows that the IPA relies only upon the FCC's promulgation of the New Services Test ("NST") to support its claim that the payphone rates of Respondents Verizon and Sprint are unlawful. For example, see Petition at ¶ 10. At no place in the Petition does the IPA argue that the IURC should apply the NST to Verizon and Sprint as a matter of state policy.

Joint Reply at 1-2. Respondents further argued that "FCC's 'encouragement' in the face of its own clear understanding of the rule of law that it lacks jurisdiction...is not a basis for this Commission to draw Respondents ... into a proceeding in which the genesis is clearly a federal mandate." Joint Reply at 3.

Respondents claimed that the Commission already reviewed and approved the rates for both companies; therefore there is no reason to apply the New Services Test to Verizon and Sprint. Joint Reply at 4. Respondents argued that the independent payphone providers "have gained significant market share under the existing price structure, without the need for the additional, redundant application of the [New Services Test]." Id. at 6. Moreover, the "imputation requirements in Indiana require Respondents Verizon and Sprint to charge their own payphone operations the same rates that they charge PSPs." Thus the application of the New Services Test is not necessary to promote competition. Joint Reply at 5.

Standard of Review.

A Motion for Judgment on the Pleadings under Indiana Trial Rule 12(C) tests the legal sufficiency of the pleadings. *O'Connell v. Town of Schererville of Lake County,* 779 NE.2d 16 (Ind. Ct. App. 2002). For purposes of a motion for judgment on the pleadings, the Presiding Officers must view all of the well-pleaded facts alleged in the IPA's Complaint as true. *Rhoade v. Indiana Department of State Revenue,* 760 N.E.2d 621 (Ind. Ct. App. 2001). Moreover, all reasonable inferences must be drawn in favor of the Complainant. *Menefee v. Schurr,* 751 N.E.2d 757 (Ind. Ct. App. 2001). The moving party does not admit assertions which constitute conclusions of law, but for the purposes of the motion only, does concede the accuracy of the factual allegations in the Complainant's pleadings. *Eskew v. Cornett,* 744 N.E.2d 954 (Ind. Ct. App. 2001). Therefore the Presiding Officers must deny the Joint Motion if the relief sought by the IPA may be granted under any circumstance.

Analysis and Order.

Indiana Code § 8-1-2-4 requires that charges by a public utility "shall be reasonable and just, and every unjust or unreasonable charge for such service is prohibited and declared unlawful."

Moreover, § 8-1-2-42.5 charges this Commission with regularly reviewing the rates and charges of all public utilities. In light of the FCC's recent re-evaluation of the New Services Test in its January 31, 2002 Order, the Presiding Officers find that this is an appropriate time to review Respondents' rates. The fact that Respondents have tariffed rates that have already been reviewed and approved by this Commission, does not prohibit this Commission from reviewing those rates in light of the FCC's reevaluation of the New Services Test and due to changes in the market and competition since those rates were approved almost three and a half years ago.

Further, Verizon and Sprint have not raised sufficient justification for treating the Respondents, as dominant, monopoly providers in their respective territories, differently than SBC simply because SBC is a Bell Operating Company by its genesis. The Commission has, to date, imposed the same standards and methods on Respondents' rates as it did to establish the payphone line rates for SBC. Respondents recognized this in their Motion and alleged that they "have already established compliance with the New Services Test." Motion at 5. We see no reason to deviate from that history. Nor do Respondents cite any authority that suggests we may not continue to impose the New Services Test on Verizon and Sprint as we have done in the past.

The Complaint alleged that Respondents' rates – including Respondents Verizon and Sprint – fail to comply with the New Services Test and were unlawfully set. For the purposes of this motion alone, we must view those allegations as true. Dismissing Respondents from the Cause before any of the issues are reviewed or developed would be premature and impermissible under the standards adopted by the Indiana Courts for review of a Trial Rule 12(C) Motion for Judgment on the Pleadings.

The Presiding Officers hereby DENY Respondents' Motion.

**IT IS SO ORDERED.**

David W. Hadley

David W. Hadley, Commissioner

Carol S. Comer

Carol S. Comer, Administrative Law Judge

Date: 3/19/03

Nancy E. Manley

Nancy E. Manley, Secretary to the Commission